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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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WHITEBOX RELATIVE VALUE PARTNERS, LP, et al.,

Plaintiffs,

v. 20-cv-7143 (GBD)

TRANSOCEAN LTD., et al.,

Defendants. Oral Argument

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New York, N.Y.
(via telephone)

October 28, 2020
10:40 a.m.

Before:

HON. GEORGE B. DANIELS

District Judge

APPEARANCES

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(Via telephone)

THE COURT: Good morning.

Why don't I hear from the defense first on their motion. Mr. Kurtz and Mr. Weedman, who is going to talk?

MR. KURTZ: It will be me, your Honor. Glenn Kurtz.

THE COURT: All right. Go ahead, Mr. Kurtz.

MR. KURTZ: Good morning. Thank you. Glenn Kurtz on behalf of Transocean. I want to start by thanking the Court for setting and keeping this hearing date. We have a slide deck that I will be putting up, but as we set forth in our papers, although we believe that the default notice here at issue is baseless and invalid, it is creating problems for the company -- and maybe you could pull up the first slide -- because it could cause Transocean to lose access to its $1.3 billion revolving credit facility; it could impact the ability to qualify for new drilling contracts or even to maintain the existing drilling contracts; it can adversely affect the company's credit rating and accelerate debt and depress the price of its notes -- which is why we have moved expeditiously in this case for summary judgment.

And it's not clear, both parties agree, that the issues that we are presenting can be resolved as a matter of law under the undisputed facts and the unambiguous contract provisions. We do not have an agreement obviously on who should win. And we do have an agreement that summary judgment

is appropriate at this time. And so I would move, for the reasons that it is Transocean that is entitled to summary judgment.

And just for a little bit of background -- and we can move to slide 2 -- Transocean is the world's leading international provider of offshore contract drilling services for oil and gas wells.

The industry is distressed, as are many other industries, given the pandemic. And Transocean took advantage of an opportunity to improve its leverage, interest expense, and extend its maturity dates to better position itself for long-term success.

Transocean took these steps through exchange transactions that resulted in a substantial reduction in debt through the issuance of about $925 million of new structurally senior debt, reducing the face value on previous existing debt.

Whitebox is an existing prior noteholder and, along with a group other distressed investors, has been pushing for bankruptcy. We don't believe that bankruptcy is anywhere near warranted or appropriate. There has been a public campaign and a beating-the-bush campaign to get people to join. There was an effort to restrain the exchange offer. That was unacceptable. Where they've gone to now is to issue a notice of an event of default.

And specifically, what Whitebox complains about is

that Transocean has raised the $925 million in debt in a way that is structurally senior to the 2027 notes.

Transocean is entitled to summary judgment, for a number of reasons, but I'm going to start with because the amount of debt is well within the senior debt basket included in the indenture at issue.

A senior debt basket is an exception to a restriction on raising debt. And the ability to raise senior debt and the amount of such debt is a highly negotiated, bespoke, and key term for an indenture. If you look at slide 6, it is well recognized that these types of baskets that are allowing the company to raise the financing that it needs to be able to operate are one of the two most important covenants in a high-yield indenture like the ones here at issue.

Going to the next slide, Whitebox's counsel in this case, Milbank, has actually published on the need, the issuer's need for flexibility, and sometimes significant flexibility, to incur additional debt in that basket, and exceptions or carve-outs as to the limitation on debt covenants are negotiated based on the particular needs of the debtor.

Here, what the negotiation was -- and also I ought to note on the next slide, which is slide 8, that one of the underlying premises here for Whitebox is that their seniority, where they stand in terms of claims, is a key feature of the note, that their structural seniority is a key feature, so even

Whitebox concedes, indeed advocates, that these types of structural seniority debt baskets are the key terms of an indenture.

And here, if we move to the next slide, 9, what the parties agreed to in Section 4.04(a)(12) is a senior debt basket of up to, as is relevant here, $2.4 billion. And what Transocean raised, at 925 million, is significantly left than half of what they're entitled to raise under the terms, the unambiguous terms of the indenture, which is simply dispositive of their claim that there was a violation or a default based on the raising of the senior debt.

Faced with that, Whitebox has now come back and argued for the first time that Transocean cannot raise senior debt, which frankly is frivolous. And it not only contradicts the indenture, and I'm about to go through that, but it also contradicts Whitebox's own prior admission to this Court, where, on September 3rd at the TRO hearing, they specifically said, we don't dispute that they can take on additional senior debt. And that was correct when made and that is correct today.

The way this works is -- well, actually, let me start with Whitebox's position. Their position now is that the senior debt basket section, which is 4.04(a)(12), does not actually use the word "senior." And in making an argument that that means it's not senior, they sort of have it backwards,

because -- and by the way, they say that it can be used pari passu, and as I will get to, there's a specific provision, subsection 11, that deals with pari passu debt.

But they have it backwards. Transocean and every other issuer in America is entitled to raise as much financing as it chooses to raise, and can raise it in any way it seeks to raise it, senior or otherwise, subject only to whatever limitations are set forth in the indenture, which is Milbank's writing we talked about. And so it's not up to Transocean to demonstrate some explicit right to raise senior debt. It is up to Whitebox to demonstrate that there is a restriction on the indenture that would disallow Transocean from raising any debt it wants to raise at any point in time. Whitebox doesn't claim that there is any such restriction, and there is no such restriction. So that's really dispositive. It's up to them to show that there is a bar on raising senior debt, not on Transocean to show there is a specific provision that allows it.

But in any case, there is a specific provision that allows it, and I want to walk through it. That's Section 4.04. And this contains a number of debt baskets, and I chose three that are important to understanding the mechanism. And if you start with 9, subsection 9, subsection 9 is the subordinated debt basket and that allows the subsidiary guarantors to raise any amount of debt. There's no limitation whatsoever. That's

because the subsidiary guarantors don't care how much that is below them.

Subsection 11 is the pari passu section. Subsection 11 is a restriction of $2.25 billion on debt that can be raised by the subsidiary guarantor that is pari passu, because the debt here at issue, the 2027 debt, is as a subsidiary guarantor. So every dime that the subsidiary guarantor raises is pari passu with the 2027 notes and every note that sits at that level. Structurally, the subsidiary guarantor, everything there has to be pari passu by definition. That amount is $2.25 billion.

And then you get to the senior debt basket. That's 12. 12 applies to the indebtedness can be raised by any subsidiary, not limited to the subsidiary guarantors and therefore not limited to the pari passu. And that is the $2.4 billion number that I mentioned, and that is because it is raised pursuant to the credit facilities.

And if we turn to the definition of the credit facilities, we can see that the credit facility allows the debtor to raise debt, including the revolving credit facility, and that's important because that is viewed as structurally senior debt. The revolver is up at a parent company. So that's telling you right there that we're talking about being raise able to raise structurally senior debt because the debt facilities, including the revolving credit facility, which is

structurally senior, or other financing arrangements, including, as we've highlighted, indentures, that provide for long-term indebtedness, including notes and guarantees of any such indentures, here any indentures, that replace -- and the exchange here did replace -- the notes for other credit facilities, including any replacement or facility under an indenture that increases the amount permitted to be borrowed under there or alters the maturity dates in here -- there was an extension in the maturity dates as well -- or adds subsidiaries, which of course was done here. That's the whole crux of the dispute, that there was a subsidiary that was introduced.

So that's how debt baskets work. You have different categories. You have the junior one, you have the pari passu one, and you have the senior one. And so it's permitted. The notion that you would be limited under subsection 12 to pari passu debt has a number of violations of contract law. As everybody knows, it's well established that a provision in a contract, especially one that's so critical, a bespoke provision like debt baskets, can't be read out. They have to have meaning. And if they were intended to address only pari passu debt, then Section 12 has no meaning whatsoever because Section 11 already addresses pari passu debt. And if Section 12 was supposed to deal with pari passu debt, then Section 11 would be rendered superfluous because you would need a Section

11 provision that addresses only pari passu debt.

And then the baskets themselves would be conflicting because the basket under 11 for a pari passu debt is $2.25 billion and the basket for senior debt is $2.4 billion. So those would conflict as well if they were forced to be the same thing, but they don't refer to the same thing.

So the senior debt basket provides Transocean with an explicit right to raise the structurally senior debt at issue. Whitebox ignored that in its public campaign. It ignored it in its notice of default. What it's tried to focus on instead, as the Court knows, is a boilerplate, which normally is called a successor obligor clause or an ASA, "all or substantially all" provision, that's included in the indenture. And specifically, what Whitebox argues is that the implementation of the senior debt basket violates the successor obligor clause. It doesn't.

And I want to start initially by noting -- and we can go to slide 14 -- the successor obligor provision has to be strictly interpreted; it's not interpreted expansively, because it places limitations on the economic freedom of the issuer. And there is just a number of cases that are very clear about that. So there is already a rule of construction that applies here that makes their lift harder than it would be if it wasn't a successor obligor clause.

And the Whitebox expansive construction of the indenture, of the successor obligor clause, is wrong for three

reasons. The first reason relates to what I just covered, which is, because Transocean has a right to raise structurally senior debt, by definition it has a right to implement the structure that's necessary to do so. Otherwise the right would be illusory and meaningless, in violation of established rules of contract construction. And we've reproduced those in slide 12 of those cases.

And this is key: But the mechanism for raising structurally senior debt by definition is to put the debt in a structurally senior subsidiary. That's what "structural seniority" means. You look at the organizational structure and it's a senior subsidiary. So once there is a right to structurally senior debt, there is by definition a right to put in place a structurally senior subsidiary, because otherwise you would have a right that you couldn't actually take advantage of, which violates accepted rules of construction. That's why subsection 12, as a harmonizing provision, provides for the ability to raise debt in any of the companies and at any subsidiary as opposed to only as the subsidiary guarantors.

And that is exactly how the structural seniority that Whitebox is complaining about was created for the 2027 noteholders. A senior subsidiary was created, just as it was created here, to guarantee the notes. And so not only is it exactly the required structure and the appropriate structure, but it was the contemplated structure, because the parties to

the indenture have used exactly the same structure to protect the interests that they're trying to advance here, which are fully protected.

That's the first reason the successor obligor provision is not violated here.

The second and related point, before I get to maybe the real issue on what it even means to transfer all or substantially all your assets, but the second issue is, if you just accepted that somehow Whitebox was right about this, then you would have conflicting provisions. We don't have conflicting provisions. The way these work is that Transocean gets to raise senior debt exactly as allowed in Section 4.04(a)(12), but Transocean can't transfer all of its assets away, as that phrase is interpreted under the controlling test in the Second Circuit and everywhere else. And so both of these provisions are given meaning, to reconcile, to harmonize, and they work together.

Under Whitebox's interpretation, however, there is no meaning to the bespoke senior debt basket, because they claim that you can't utilize it. That not only violates the rule of construction about not rendering the provision meaningless, but also it drops you into another black letter rule of construction, which is when you have two conflicting provisions, and we don't really have that, but if you do have it, under their theory, then the specific provision governs

over the general provision, which we actually reproduce on slide 31, if it's worth going to.

There's no dispute about that. Whitebox agrees with that. The issue then is, which is the more specific provision. And as I already covered, the senior debt basket is a bespoke, highly negotiated provision designed exactly for the needs, as Milbank has said, exactly for the needs, the capital needs, of the issuer. It is recognized as one of the two most important provisions in an indenture, and it is plainly the specific provision.

The successor obligor provision, on the other hand, is merely boilerplate. Whitebox argues that it's not boilerplate, it's somehow bespoke, but in doing so, if we can go to slide 26, it not only ignores that this is a provision that's been around for decades but also ignores controlling Second Circuit authority. The *Sharon Steel* case from the Second Circuit in 1982 is the seminal case on these issues, and it's still being cited more or less every time one of these cases comes up. And the Second Circuit was unequivocal in holding that successor obligor clauses, unlike what Whitebox says, is boilerplate.

And not only is it boilerplate and therefore is to be uniformly interpreted, but this one needs to be uniformly interpreted even more so because of the consequences that it can have on the commercial market, and specifically that it must be given a consistent, uniform interpretation because

failing to do so would greatly impair the efficient workings of the capital markets, where people rely on the way the courts have interpreted the terms over the last few decades.

The court also said it was important -- we didn't manage to get this one onto the slide but it's in the case -- because government authorities and bodies have to review these, and they can't be reviewing them wondering from place to place and case to case how it needs to be interpreted, so for that reason as well there's got to be uniform interpretation.

And there is a uniform interpretation. Because, and this is third point, the third point is, there is no prohibited transfer under the governing controlling test. And the governing controlling test has been applied consistently since it was developed approximately 40 years ago, as I'll get to. Whitebox does not and cannot cite a single case rejecting the test that's been applied for the last four decades.

And it starts with -- and if we can move to slide 15, please -- the recognized test for determining whether a transaction violates a successor obligor provision is whether the transaction strikes at the heart of the corporate existence and purpose of the issuer. Courts look to see whether the sale substantially changed the nature or character of the entity's business, whether the sale involved primarily the entity's operating assets, which are of course the only income-generating assets one has. If we go to the next page.

And *Gimbel*, just to pause on the prior page, *Gimbel* is sort of the lead case. Two lead cases. *Gimbel* is a Delaware court. They deal with this a lot, primarily in stockholder vote cases because the same language is included in sales of all or substantially all the assets of a corporation.

If we go to the next slide. Courts look to whether the transaction fundamentally alters the company's existence and purpose and leaves it unable to conduct the business it was formed to conduct. Courts look to whether the transaction represents a radical departure from a historically successful line of business. Courts look to whether the transaction constituted a watershed event that fundamentally altered the company's business and mission.

The courts look to see whether the transaction resulted in a liquidation of the business. And interestingly, on that *Resnick* case, they addressed the formation of two new subsidiaries that were wholly owned, and confirmed that it didn't change the business. They look to whether the transaction results in a liquidation. These are the types of actions that would logically of course involve a sale of all or substantially all the assets, because if you did sell all your assets you would no longer have the business, you would be in liquidation.

If we move to the next paragraph, the next slide, what they do is they apply -- this was formulated by *Gimbel*, decades

ago -- is they apply a test that looks quantitatively and qualitatively at the transaction, in an effort to determine how it affected the purpose of the corporation. And that's been applied uniformly by all the cases.

And if we go to the next slide, what does all that mean? And what it always comes down to is the economic substance of the transaction and the impact that the transaction has on the economic vitality of the corporation. So they look at the economic value of the assets that were transferred. They look to see whether the company continues to have economic vitality after the transaction was completed. And courts look to the economic substance.

I included *Oaktree* because Whitebox relies heavily on that case, claiming it did not adopt the qualitative and quantitative test. The court in that case issued a decision on a TRO on very, very little notice, actually said "based on the little time I've had," and they never mentioned any test. But what the court did do is say you look at the economic substance, that you don't look at the form, which is what Whitebox advocates here, you look at the economic substance. And in that case there was an economic substance. In this case there is no economic substance.

I'm going to the next test.

And what you're trying to evaluate in an indenture is whether there has been some impact on the ability to repay the

loans. And I'm going to come back to *Sharon Steel* because it governs very clearly on Whitebox's incorrect position that the Court should reject the same test that's been adopted and applied uniformly for the last 40 years, without any authority supporting that. But what *Sharon Steel* goes to -- and *Sharon Steel* is an indenture case. And I'm going to come back to the teaching that you're look at what you're trying to accomplish. For an indenture case, what you're trying to accomplish is a degree of continuity of assets. The purpose of the clause, as found by the Second Circuit, was to ensure that the principal operating assets, which are the assets that produce value, of a borrower are available for satisfaction of the debt, and cited, positively, the commentary, the American Bar Foundation commentaries on indentures, which have been cited by a volume of courts. It's well accepted that the decision to vest in a debt obligation of a corporation is based on the repayment potential of the business enterprise possessing specific financial characteristics, and -- hopefully it's on the next page -- the court -- well, we'll come back to that. So that's what you're looking to see: the transaction made it so that you're not going to get repaid. And here, the transaction doesn't strike at the heart of the guarantor's corporate existence and purpose. It's not a watershed event. It's not a liquidation, stripping the company of its economic vitality and ability to pay. To the contrary, there's been no change

whatsoever in the economics, no change whatsoever in the holdings, no change whatsoever in the value of the subsidiary guarantors, and no change whatsoever in the their ability to repay debt.

THE COURT: You don't have any disagreement with them on the question of whether or not the agreement provides that a transfer of all assets or substantially all assets can only be done under certain conditions to protect the guarantee. You don't disagree with that, first of all. The area of contention between you two is whether or not this transaction is a transfer of all or substantially all of the assets.

MR. KURTZ: That's exactly correct, your Honor. We have these defined tests that I just covered that are intended to tell you, under the successor obligor provision, what is a transfer of all or substantially all. And that means, have you compromised the ability to repay the debt, have you stripped the company, liquidated the company, left it with nothing that it could use to repay the debt. You can't do that. We haven't done that, because all we've done is a corporate reorganization.

And if we pull up what we've done. So before the internal reorganization, yes, the upper note guarantors or subsidiary guarantors were merely holding companies. And the only value they had is they indirectly 100 percent owned the operating entities, which have all the value. And there's no

dispute, that's where all the value is. Everything else is just share certificates.

Following the internal reorganization, the upper tier note guarantors continue to be the same mere holding companies, and they continue to hold indirectly 100 percent of the same operating entities. There has been no leakage whatsoever. There is no impact on their ability to repay the debt, because the identical assets that existed to repay the debt are still owned, to the same extent that they were owned before the internal reorganization. And if there was a default and the noteholders obtained judgment and wanted to execute against the judgment, they would execute against the identical assets that were held pre the organization and post the organization. There's been no leakage of assets whatsoever. And I submit that as a logical practical legal matter, that conclusively proves that there has been no transfer of all or substantially all the assets, because the same assets are still there to repay the debt.

THE COURT: Well, their argument, if I understand it correctly, is that that makes it not more likely that they would get paid, it makes it less likely that they would get paid, because you have now an entity in between that controls all of the assets, and they have other debt which may be senior to this.

MR. KURTZ: Right. So there's no doubt that all the

assets are still 100 percent owned. But you're also right, your Honor, that by reason of Section 4.04(a)(12), the senior debt basket, there has been some senior debt that was raised, $925 million, and therefore, while the same exact assets are available and haven't moved, there are some senior claims exactly as permitted.

The amount of that leakage, so to speak, which is permitted, and therefore can't be a breach, but the amount of that is $925 million against $22 billion of consolidated book value, meaning it's less than 5 percent of the outstanding assets. So if for some reason, that leakage that you're identifying was the transfers themselves, there's still 100 percent ownership but there's new claims. So there has not been a transfer of assets. There's been an allowance of structurally senior claims. But if that was characterized as some kind of transfer, even though technically it's not, it's just senior claims, the amount of that transfer is less than 5 percent of the consolidated assets of the entities. And therefore it's not even close to all or substantially all. It's not even material.

But I would highlight that there is a provision that addresses structural seniority, and that's 4.04. The boilerplate successor obligor clause doesn't address structural seniority, it addresses the movement of assets. And there hasn't been a movement of assets because the same exact assets

are still available. True, if they went to execute, there would be other claims, but that's permitted. And I would say that it's simply impossible to say that the guarantor's assets have been transferred. Every single one of them has been transferred, but every single one of them is still available to be used to repay the debt, not only this debt, all the debt, but *the* debt, and the assets are still available to satisfy any other judgment. So if you look at what was done here, it's purely an internal reorganization because all that has happened is there has been the introduction of an additional intermediate hold company. And that doesn't affect anything except an internal reorganization. It's just another piece of paper.

THE COURT: It could possibly adversely affect their recovery if there is a circumstance where they're standing in line with other creditors, and there's a limited pot of money left, and those new creditors have a priority over them that they didn't have at the time the agreement was entered into. So there is, at least theoretically, the possibility that they may not get fully paid.

MR. KURTZ: Right. I agree with your Honor that by definition when you're evaluating the transfer you're looking at the economics, and specifically you're looking at the ability to be repaid. You will take into account of course the ability to be repaid, which takes into account, I guess claim

priority, except the two responses I offer is, one, 4.04(a)(12) specifically allows exactly for not just the $925 million to be used to prime them but $2.4 billion. So you can't put them in violation for exercising that right. And even now, even now Whitebox would say, sure, you can raise $2.4 billion of senior debt at the revolver, which is at the parent company, which is structurally senior debt. That would stand in front of them. So they're not in any different position than they would be in without the reorganization. The reorganization is just a way to enforce the right to raise senior debt under the senior debt basket.

And the second response is, but even if you sort of avoid all of that, you'd still be talking about allowing a transfer, so to speak, in that circumstance, of less than 5 percent of the total assets that are owned directly and indirectly by the subsidiary guarantors. And that's nowhere near a successor obligor. People don't argue in the 90s, 90 percent about that. People start to argue in the 70s, sometimes in the 60s. It gets a little complicated. They start to evaluate qualitatively and quantitatively how this works. But there is no way anything under 60 or 50 percent could ever violate a successor obligor. And here, if your Honor says you're going to look through the structure, you're going to set aside the market basket, which I think needs to be harmonized, and say, I find practically speaking you've had a

$925 million leakage, you're nowhere near all or substantially all. If that's a transfer, we win easily, by orders of magnitude.

And let me move to *Dynegy*, because *Dynegy* is on point. It's out of the Delaware chancery court. New York and Delaware are deciding most of these cases in large part because a lot of merger cases are in Delaware, a lot of indenture cases are in New York and Delaware.

First, before I move to it, let me stop here. This is an internal reorganization. It's nothing more than the introduction of an intermediate subsidiary company. And we have authority from this court -- not your Honor specifically but Southern District, in the *Tyco* case, which is a very significant Southern District case, that specifically said there is no indication that successor obligor clauses are intended to require a consent from the noteholders for an internal restructuring. Internal restructurings, reorganizations, are not part of a successor obligor clause. That got discussed in great detail in the *Dynegy* case, with I'd like to move to because it's really on point.

And the next slide. *Dynegy* had an internal restructuring that was similar to the one we have here. And the Delaware court confirmed that it was looking at New York law and that both New York and Delaware law look to qualitative and quantitative factors. And applying New York law, the

chancery court found that the holder company, it was the same thing here, it was setting up intermediate holding companies. They said, look, the ultimate company liable, the hold company, they generally hold indirect interest, just like the subsidiary guarantors here hold indirect interest, in companies that hold power plants, here in companies that own the operating assets as well. That continues to own the same interest in different companies under the same corporate umbrella. They still own the same power companies. So because the nature of the company doesn't change, before and after that reorganization, the court concluded that from the qualitative standpoint, the plaintiffs aren't showing a likelihood that they can demonstrate a breach of the successor obligor clause.

If you go to the next slide, then the court turned to the quantitative analysis and said, look, the transfer at issue is between subsidiaries having the same parent, again as here. It's an internal corporate reorganization. And the ultimate company, DHI, as here, retains the value, and "value" is the word they used. Whitebox quarrels with the word "value," but it is obviously a part of the economic analysis. The value of the plants embedded in the ownership of the entities that directly own those plants is still owned, as it's still owned here today. The court said that even if the plaintiff had arguably shown that DHI had transferred all or substantially all of its assets to a newly created subsidiary, which is what

Whitebox argues here, it was irrelevant, literally irrelevant, because the newly created subsidiaries still will be subsidiaries of DHI, and any assets transferred to them are not being transferred away from DHI's ultimate ownership. That's exactly what's happening here. Nothing is being transferred away. It's the identical type of a transaction.

Now there's really no way to deal with this case for Whitebox. What they say is it is dicta. It's not dicta. The court issued two holdings, including the one here at issue. And the court said, "I find that plaintiffs are unlikely to succeed in showing that DHI did so 'substantially as an entirety,'" transfer the assets. That is a holding. There were two issues that got addressed by the court. The first issue that got addressed related to a form of successor obligor that extended to just the parent versus the parent and subsidiary. That's not relevant to your Honor's determination. We don't have that type of an issue here.

The second part of the decision dealt with, what does it mean to be all or substantially all, and how does an internal reorganization fit in? That's what's relevant. That's what we cited. Whitebox cites only to the part of the decision that's irrelevant. And you can't avoid the decision and the reasoning by looking at a part of a decision that we're not raising here and that's not relevant here.

So we have a governing case. We have a case on point

in *Dynegy*, and we spent frankly the majority of our papers, and probably close to a majority of my time so far here, demonstrating that this transaction easily, as evaluated under the governing test that's been applied uniformly for 40 years, demonstrates that there is no transfer of all or substantially all of the assets.

And Whitebox, in its papers, has not disputed that fact, that when you apply the governing test, there has not been a transfer of all or substantially all the assets, or in fact a transfer of any of the assets. Whitebox instead asks this Court to reject the test that's been applied in the Second Circuit and been applied by every other court that's addressed these issues in the last 40 years. Whitebox does not and cannot cite a single case rejecting the test, or even calling into question the efficacy of the test, which has been applied uniformly for decades. That's how meritless the position is, that to get there, your Honor has to walk away from the Second Circuit and every other case that's addressed this for the last 40 years.

There's a couple of ways that Whitebox tries to avoid the test. The first way, they say, hey, it's undisputed that there's been a transfer of all of the assets; let's say that repeatedly, say that with italics and bold throughout the briefing. That's just not true. It's fully disputed, and in fact we think we've proven exactly the opposite, that when you

apply the test, there hasn't been a transfer of any of the assets; there certainly hasn't been a transfer of all of the assets. And you can't avoid the test for determining whether there's been a transfer of all the assets or substantially all the assets by claiming incorrectly and repeatedly that the parties agree to the matter. We don't.

The second way that Whitebox tries to avoid the test is by arguing that the provision is unambiguous. And as your Honor pointed out, there has been a transfer of the stock of one of the intermediate hold companies. And so the Court shouldn't follow the established test that's been established for determining whether that violates the successor obligor clause because they say it's clear that it does. A literal interpretation of "all" includes the stock certificates, even though it's only an intermediate holding company and somehow you ignore the economic substance, which is it continues to hold exactly the same assets, your Honor points out subject to some structurally senior claims, as allowed, of about 4, 5 percent of the total assets, but nonetheless only of the assets that have been transferred. So that's this literal interpretation that not a single court has ever adopted. Whitebox wants you to be the first.

The problem they run into when they simply ignore this is that the Second Circuit has already considered and has already rejected exactly this approach when adopting, in a

seminal case, the way you're supposed to evaluate this. And that's *Sharon Steel* again. If we pull up slide 6, *Sharon Steel* addressed exactly this argument: just look at what was transferred without looking at the economics and so on. And the court rejected that literalist approach as a, quote, masterpiece of simplicity. And you'll note, I think I saw it in the slides you're going to see from Whitebox, they say this is really simple, you just go, you can't transfer it all, the certificates are all, and we ignore all the economics, all the qualitative factors, all the quantitative factors, and so on. In interpreting a successor obligor provision, the Second Circuit, controlling authority, says a literalist approach, a literalist approach proves to be too much. The court held that "all or substantially all" is the phrase used in a variety of contractual provisions and therefore must be read in light of the particular context and the evident purpose for the provision. The court said you don't look at the literal, you don't look at the masterpiece of simplicity; you look at the context and its purpose.

And then the court said, and we went over this, that the purpose of the provision, as used in an indenture, is to ensure continuity of assets, to provide for the repayment potential, and to make sure that -- it says one purpose of the clause is to ensure the principal operating assets of the borrower are available for satisfaction of the debt.

By the way, the court never found another purpose. That really is the purpose. And as I've already covered, the ability to repay the debt has not been impacted at all by the reorganization.

Your Honor did raise the senior claims, which I've responded to. But let me break this up. The internal reorganization would be allowed up to $2.4 billion irrespective of whether anyone agreed to participate in the exchange offer. But the assets itself haven't changed. The only thing that's changed is claim seniority. And claim seniority is not addressed in a successor obligor clause. Claim seniority is addressed in the 4.04(a) basket, subsections (9), (11), and (12). Successor obligors don't apply to claim priority. The open way it becomes relevant is the successor obligor provision does have a purpose of ensuring repayment. So I guess I'm not necessarily quarreling with your Honor's view that therefore repayment is relevant. but the assets haven't actually changed. And if you're looking at the impact that they have, in addition to having been allowed under the senior debt basket, it is again less than 5 percent, so not all or substantially all.

So *Sharon Steel* is controlling. It rejects exactly the position that's being advanced by Whitebox. It's been ignored by Whitebox. It can't be ignored because it's Second Circuit. And I want to note also that another notion here that

Whitebox relies on is the idea of how the percentages really are controlling in all of this. If they are, by the way, 5 percent is not getting you there. They rely on *Hollinger*, which was a decision from then Vice Chancellor Strine in the Delaware chancery court, who then ultimately ended up on the Delaware supreme court. He actually specifically said you don't look at percentages if there's no necessary qualifying percentage. And the reason for that, that Vice Chancellor Strine noted, is because the words "substantially all" and "all" mean the same thing. They all mean the same thing. "All and substantially all" is just a lawyerly way and a legislative way to pick up effectively the same thing. And so whatever works for "all" works for "substantially all," and whatever works for "substantially all" works for "all."

And it's worth noting here, again to move to something very practical and obvious and logical, is, if you have a test, as you do, that's been applied for decades, because it evaluates whether or not a transaction is a transfer of all or substantially all the assets, by definition, if your transaction was all, it would be picked up in the test. A test is supposed to pick up exactly that, and maybe even a little less than that. So if you're at the top end of the test, as they say they are, where it's all, then you would easily and by definition satisfy the test. Yet they can't satisfy the test because that's not right.

And I also note some of the illogic of their position that somehow, because they allege it's all, you don't apply the test. That means that if you apply the test to a transfer of 99 percent of all the assets, which is plainly all or substantially all, the test would evaluate it and tell you that that's transfer, that violates. But if you transfer a hundred percent, somehow the test blows up, the test that's been applied somehow stops working. There's no algorithmic formula or other issue in the application of the test, which is only focusing on economic factors, that would cause it to stop working, to have some sort of bug when you flip from 99 percent to 100 percent.

So, again, by definition, if this was a transfer of all or substantially all, it would satisfy the test and it would satisfy the test the easiest of any other test.

THE COURT: I don't understand the dispute to be over the percent of the transfer. The dispute is over the nature of the transfer.

MR. KURTZ: Right. I think that's right, your Honor. What I was probably trying to respond to is, there's an argument being raised by Whitebox that somehow all the cases that we've gone over, all the cases that have been applied uniformly for four decades, don't apply because they're claiming the transfer was all, meaning 100 percent. I put that into a percentage. All because it was a transfer of the

intermediate stock certificates from other intermediate stock certificates. And so in a sense they're going to percentages because they're saying, hey, once you did, quote, all, somehow that now is a violation, even though it has no impact economically, and even though it's not all or substantially all, how the tests have been applied. And so what I said is, well, if you take that argument, tell me why it is that if they -- let's say the transfer was 99 percent of the stock instead of 100 percent of the stock of a mere hold company intermediate in the capital structure. Now you're saying the test applies. And now when you apply the qualitative and quantitative factors that have to be evaluated under the Second Circuit and every other case, it's not a transfer, but if that last 1 percent goes, it is a transfer? I'm just saying it doesn't make sense. It's another reason that it doesn't hold up, because if you were right that just because there's been a transfer of all of the intermediate hold company's stock, you don't look at the test, the test would actually pick that up. The test would say, that's everything. But it's not everything.

And here's the last piece I think I have on this issue, which is that it's not "all or substantially all" under the test that applies. It doesn't have any impact on the ability to repay, certainly not in "all or substantially all." But the words also don't support this literalist approach,

this, what was the word, the masterpiece of simplicity approach. It also doesn't work because the words are "assets." And an asset is a broad term. And an asset includes not only what you own directly but what do you own indirectly. So when you have some remote subsidiary with all the value in the world, and you still own it, to the same extent, then you haven't gotten rid of all your assets.

And so we have this illustration here, where if you had a holdco that owned 100 percent of another holdco, which owned 100 percent of the operating assets with value, then the holdco at the top, holdco A, owns 100 percent of the value. The value of holdco A is the value of the bottom box. That's worth a billion dollars. Then holdco Z is worth a billion dollars and holdco A is worth a billion dollars.

And that holds true whether it's owning the equity of a holdco that owns the equity of a holdco, or owning the equity of a holdco that owns the equity of a holdco that owns the equity of a holdco, all the way down, because if you maintain 100 percent interest, 100 percent all the way through, it has no economic impact. So if you're still worth a billion dollars in that last box, 100 percent of a billion dollars up through Z, to B, to C, to B, to A is still 1 billion dollars. And so unless you put a non-wholly owned sub in there, it doesn't matter whether you've organized yourself with one, two, or 77 intermediate holdcos; as long as you 100 percent own the bottom

assets, that's your value. So if you move again, practically speaking, for a sale, execution purposes, foreclosure, or just to sell, when you move to a sale, the value that you will achieve is the same pre reorganization, post reorganization. The value of that bottom box of operating assets that have all the value is going to be the purchase price regardless of whether you have one, two, three, or five or more holdcos sitting in the middle, operating as nothing other than a stock certificate, without operations, without additional assets. It's all pass-through. And when you include a longer tunnel of pass-through, you don't transfer everything you own. By definition, if you could get the same price post reorganization as you got pre reorganization, based on the identical assets, which is what you have here, you couldn't have transferred them away. Because if you transferred them away, you would have nothing left. You'd have no value. You'd have no purchase price.

So these are just sort of common-sense checks on the law, that not only is the law correct, but it's obvious from any economic or logical or practical standpoint as well.

The last point I think I would address with your Honor is -- it's going to become obvious, I think, after Whitebox starts to present, that they have a very hypertechnical argument, where you don't look at qualitative factors or quantitative factors, or the impact on the business, or whether

it's a liquidation, or the economic vitality, or any of those matters. They just say it's "all." And, again, the Second Circuit has already rejected that approach, and nobody has even tried it since as far as I know. But if we were going to ignore the Second Circuit and the senior debt basket and four decades of law and logic and economics and fairness and common sense in favor of this hypertechnical reading, there's still no violation, because 11.03 applies to a person, of all or substantially all the assets. And there was no transfer to a person because the way it worked, if we flip, is, there was thirds. Thirds went. So you're not ending up with a single person.

Notably, if we go to the next slide, *Sharon Steel* actually mentioned these work when there's transfer to a single purchaser. And if we go to the next slide, it's interesting, there is a form of successor obligor clause that talks about, in fact one even in our indenture, that talks about a transaction that's in one or a series of related transactions. We flipped a slide that was actually the form used in the *Dynegy* case, and that was a form used in the *Wilmington Trust* case. That was not a form used here. So you're not allowed to collapse. And so then you only have a transfer of a third.

THE COURT: Well, I'm not sure I understand your "person" argument. There's a definition of "person" that is in the agreement, and I don't see why that definition excludes the

subsidiary.

MR. KURTZ: Right. It doesn't. It doesn't. I don't think there's a dispute on what the word "person" means, and it can be singular, and it can be plural, depending upon how you're using it. I'm not saying that if you transfer to a single person, versus a number of people, that you would be barred. What I'm saying is that each of the persons, because they are separate entities, only got a third. And so if -- and I don't think we need to get to this. I guess what I'm trying to say is, if we go practical and under the governing law, it's really easy. If you tried to be hypertechnical, well then, you don't get to be half hypertechnical. So the way it's working now from Whitebox's standpoint is they say, well, I know you still own everything and so you're really on a quasi consolidated basis, you have everything you used to have, you've just kind of moved a subsidiary in, and so, but I'm not going to do that, I'm going to be hypertechnical and tell you that I'm going to view you as standalone. But then when you get to the point where you say, OK, but now there's only a third to each new company, there's not all or substantially all to any person, it's a whole new company, they say, well, now I think you ought to treat them all as one, and now each individually created subsidiary is now one entity -- when it's not. They all have their own certificates.

THE COURT: I didn't understand it to be that it

depended on how many people you transferred the assets to. It depends on whether or not you have transferred all of the assets. So what they are considering is whether you transferred it to one company, two companies, or a hundred companies, if you transferred substantially all or all of your assets.

MR. KURTZ: Right. Your Honor, I don't really disagree with you at all. I think the test accommodates an intelligent economic analysis exactly as you're advancing, or commenting on. I guess all I'm saying is, if you don't do that, if you do what Whitebox does, then I think from a hypertechnical standpoint they would be wrong, because each individual would only give away a third to a third. I don't think that matters. I think what matters is that there's been no transfer whatsoever, because they still own their indirect ownership interest in a hundred percent of the assets, and they haven't affected in any way their ability to repay, and that under every governing law it's an internal reorganization, that internal reorganizations don't violate the successor obligor clause. And what they've done, while introducing some seniority, is exactly what was allowed, and even they agree it is allowed at least with regard to the revolver, which is structurally senior.

So I don't see the need to get here. I was just suggesting that they can't be hypertechnical when it benefits

them and then not be hypertechnical when it doesn't benefit them.

The last very brief point I'll make is, the notice of default here is defective. There's a 90-day cure period before there can be an event of default. They suggested there's already an event of default. They have said they're accelerating. You can't accelerate until you're past the 90-day cure period. You enter into a new period. And then the then-holders have to consider whether they have a right to take action and then to determine what action to take. It can't be done now months in advance of when it can be done. We made these points. There was no opposition at all, other than a statement about, they don't agree with us, or no further discussion is warranted. It's a motion for summary judgment. The only time for a discussion is now. It's warranted. They didn't oppose it. So the notice of default is invalid in any case.

There was an issue on your Honor's ability to grant relief that's effective that we covered in our brief. I didn't see it in the slides, so maybe it doesn't come up today. If it does, I'll comment in reply. But I thank your Honor for what I know was a very lengthy initial presentation. Unless you have questions, in which case I'd be delighted to answer them.

THE COURT: No. Thank you.

(Discussion held off the record)

THE COURT: So is it Mr. Leblanc?

MR. LEBLANC: Yes, your Honor. Good morning. I'm just going to take a second to put our PowerPoint slides up on the screen.

THE COURT: That's fine.

(Discussion held off the record)

MR. LEBLANC: Hopefully your Honor can see the slide deck that I've also put up.

THE COURT: Yes. I have the PowerPoint in front of me anyway.

MR. LEBLANC: Thank you, your Honor.

Again, for the record, this is Andrew Leblanc of Milbank on behalf of Whitebox Relative Value Partners and the other plaintiffs in the action.

Your Honor, let me begin by first thanking the Court for accommodating me on Skype. When the order came out I was actually quite excited to actually have an in-person argument. I've realized that the Commonwealth of Virginia has been placed on New York's list. But we appreciate your accommodation, and I would love to be referring to your Honor's chambers again and arguing as soon as we can.

We did cross-move, your Honor, for summary judgment, but I would like to reserve just a couple minutes after Mr. Kurtz's reply.

Your Honor, let me just begin with what I think is an

interesting commentary about this argument. We believe this is a simple breach of contract case. If you look at the terms of our notice of events of default, we identify one provision that we contend has been breached in our indemnity, the indenture for the 2027s. That one provision is Section 11.03. And if your Honor would like the cite for that, ECF no. 28-7 is the events of default.

THE COURT: Yes. I have the agreement in front of me and Section 11.03.

MR. LEBLANC: Right. Your Honor, what's remarkable is, Mr. Kurtz by my calculation spoke for 54 minutes before he even showed you and put up on the screen the words of 11.03.

Let me be crystal clear about this. We do not contest that Transocean violated the indenture by raising some assets under Section 4.04(a)(12). We do not believe there was a breach. We have never alleged that. We didn't try to enjoin them from doing that. They engaged in another transaction, namely, the transfer of assets from our guarantors, the subsidiary guarantors, as that's defined in the indenture, to another entity, which itself, again, we don't contend was impermissible. Section 11.03 doesn't prevent them from doing that transfer. What Section 11.03 says, and if your Honor looked at our slide deck before today, you'll notice that we cited many cases, but it actually says that if they engage in that transfer of all of the assets of the subsidiary, then the

obligation is on them to have a guarantee issued by this new entity. And that, the failure to issue the guarantee by the new entity, that is the breach that is alleged, nothing more, nothing less. All of the talk of their compliance with Section 4.04 is not in issue here.

And one other comment, your Honor, before I get into the substance of my argument, is the following. If they go through the transcript and count the number of times that Mr. Kurtz said "boilerplate," "boilerplate," "boilerplate," suggesting that the Section 11.03 is a boilerplate provision of the indenture and that therefore your Honor should just defer to other cases that have interpreted what he terms is boilerplate, the facts are quite the opposite of that. This provision, 11.03, sits in a different section of this indenture from the common subsidiary guarantor provision that I will agree is a boilerplate one. That provision is Section 5.01 of this agreement, and frankly of any agreement. That is the boilerplate successor liability obligation provision. That is what is interpreted in *Dynegy*, in *Sharon Steel*, every other case that they talk about. And the failure by Transocean to recognize that our provision is not that boilerplate provision is a fatal flaw of their argument. It is not dispositive to what other courts have said about a different provision that has fundamentally different terms. And I will walk your Honor through that as I go through. But what's critical to recognize

is that when you realize that this is not a boilerplate provision, you actually have to look at the words of this provision and see what was designed to be protected and what it does. Then I think your Honor will agree with us that the transaction they engaged in here, and here, what I mean by that is the transfer of all of the assets of our guarantors to a subsidiary that was then not obligated on our debt, and then the decision by those not to grant a guarantee to us, that is a breach of the very purpose of the section that was put into this agreement. This is not a boilerplate provision.

Mr. Kurtz refers to fact that in 2015 the company had issued a series of what we call PGNs, or priority guaranteed notes. The 2027s, which are at issue here, where we issued a notice of default, my client, they have this Section 11.03. Other issues of the priority guaranteed notes do not have it, they do not have Section 11.03 in their indenture. Apart from being boilerplate, it's not even consistent across all of the priority guaranteed notes. This provision appears in two different Transocean priority guarantee notes. It appears in regard to the 2027s and it has been breached with respect to both of them. But it has not been breached with respect to, for example, the 2026s, which are a different series of notes that do not have this provision.

All of them have Section 5.01, the boilerplate language, but not all of them have Section 11.03, which is the

provision that has been breached here.

And so, your Honor, let me now turn to our argument, and I think you will see how quickly we turn to the factual contract language that we're asking that is at issue here in the alleged breach and what we're asking you to look at. But first let me respond to -- and I think your Honor has discussed this with Mr. Kurtz. Mr. Kurtz has put up a number of slides at the beginning to suggest that all they've been doing was, you know, liability management exercises. And he refers to something, in Mr. Kurtz's slide no. 3, he references the fact that Transocean decided to improve its capital structure, and it says "to take advantage of opportunity to improve their leverage and other things." They're actually more explicit in their pleadings before the Court. In their opening brief they said, "In light of the opportunity resulting in 2020 from debt market turmoil," and skipping an intermediate clause, "spurred in part by the COVID-19 pandemic." So what they actually put in their papers is that what they wanted to do here was take advantage of the pandemic in a way that reduced their value by over a billion dollars, and then allow that value ultimately in their view hopefully to be available with shareholders if the value was there.

But they're not coming into this court wearing the white hat, your Honor. They are trying to take advantage of the pandemic. And the issue that they have is, they could do

it to an extent, but they just have to comply with the terms of our indenture, including Section 11.03. But what we show on this slide, your Honor -- the ECF numbers are there -- is just how devastating these events are for the holders of the 2027 notes that are at issue here. Before the transaction, these notes in the summer, even after the turmoil caused by the pandemic, were trading at something around 50 cents, 49 cents. Today, your Honor, these are trading at 27 cents, if your Honor can see that. I actually think, your Honor, I may have pulled a different, or a slightly different version. In the paper version they look a little bit different than this one. This was an earlier version of the slide, I think, that I have up on the screen, but it's the same information we just described to make it a little bit more readable.

But the point is, our clients have lost half of the value of our investment subsequent to the breach of the indenture by Transocean. This has had a devastating effect, and your Honor had alluded to it earlier, and it really is because they breached an express provision of our agreement in engaging in the transaction that they engaged in.

So let me turn -- as I said, your Honor, I am going to throughout the day refer you to the words in Section 11.03. And I want to talk through it repeatedly, and we're going to come back to a slide that looks an awful lot like this, because this is the foundation of the entirety of our case.

Section 11.03 is in an article within the indenture that governs only issues related to the guarantee. That is, Section 11 as a whole governs the guarantee.

Section 11.03, by its terms, says that it is permissive in the sense that it says that a subsidiary guarantor may engage in the activities that are there, including a transfer of all or substantially all of its assets to any person, "provided, however," and this is where our highlighting begins, "that in the case of the sale, lease, conveyance, transfer, or disposal of all or substantially all of the assets of such subsidiary guarantor, if such other person," meaning the person who received it, "is not the parent, issuer, or another subsidiary guarantor, such subsidiary guarantor's obligations under its subsidiary guarantee must be expressly assumed by such other person," and then it has an exception. It says "except in connection with a transaction in which the securities guarantee of such subsidiary guarantor would be released as provided in Section 11.06."

Now, I'm going to talk about each and every element of this as we go through our argument, your Honor. What it makes clear is that, one, this provision is based almost exclusively on one set of entities. And those are subsidiary guarantors. It is only focused on them. And it is only focused on their assets.

It is clear that it applies when that subsidiary guarantor transfers all of its assets. And it is contemplated in this provision that that transfer could be for value. So, in other words, it could transfer its assets, meaning its stock, in the asset holding companies, to another entity and get something back from that entity, because that is a sale. It doesn't have to be a gratuitous transfer. But it could be any type of transfer, including a sale.

And then the consequence of that is that the other party must become obligated on the guarantee, even the same way that the subsidiary guarantor is.

And let me just talk about the exceptions, because I think these exceptions show the import of it. It says "if such person is not the parent, issuer, or another subsidiary guarantor." What that means, your Honor, is if that party that receives all of our assets is not otherwise obligated on the debt, then this exists, because the parent, the issuer, and the subsidiary guarantors are already obligated on our debt. So you don't have to issue a new guarantee in that instance.

And then the last exception is the exception relating to transactions. It says "except in connection with a transaction in which the securities guarantee of such subsidiary guarantor would be released as provided in Section 11.06." Your Honor, what that refers to is, Section 11.06 provides that if the assets are sold to an entity that is not

an affiliate of the parent, meaning not an entity that is affiliated with Transocean, so not an internal entity, then Section 11.06 governs, and under 11.06 there is a release of the guarantee. So by its very words, this provision applies exclusively to internal transactions. That is the import of that last clause. It excludes from its application transactions that are governed by the third-party provision, 11.06, and includes only affiliated transactions. So when Mr. Kurtz talks about things like other courts interpreting other provisions, applying only to internal reorganization, this language expressly excludes that interpretation. That is the purpose of this.

Now, your Honor, we would submit that when you go through this, the transaction that they engaged in here, the transfer of the assets to the newly created lower tier holding guarantors, is exactly what people would have had in mind to protect against when they wrote this language, exactly the transaction.

Now, let me just walk through each of those points, your Honor. If I look at slide 4 -- let me actually go to slide 5. Slide 5 has the most relevant pages. And this is exactly the same thing Mr. Kurtz showed you. On the left side, this is the structure before the exchange. Where there's a green circled box, your Honor, that is the upper tier notes guarantors. Those are the subsidiary guarantors. Their assets

are defined by those lines below to the asset holding companies. The entirety of their assets are their stock investments in the assets of the company. That's it. That's all they have. Those assets have a value. They have economic interest. Those are their assets. If you look at a balance sheet for those entities taken alone, their assets would be, we hold stock in our subsidiaries, nothing more, nothing else.

If you look at the right side of our slide 5, which is the structure after the exchange transactions, your Honor, what you see is, they no longer have the assets that they had, because that asset, 100 percent of the interest in the asset holding companies, was transferred to what is now defined as the lower tier notes guarantors. Those entities own 100 percent of the assets that just the day before the transaction were held by the subsidiary guarantors. And our guarantors no longer hold it. Instead, we hold something very different. And that is a stock investment in the lower tier notes guarantors.

And, again, and I said at the outset, all of this would be fine. Our indenture doesn't prevent them from taking this test. It simply says, if you choose to take this test, you are then obligated to give us the guarantee against the lower tier notes guarantors. That's the obligation they have. That is the breach that we allege. And nothing, your Honor, in our indenture stops them today from simply issuing the

guarantee. If they're really concerned about the effects of the defaults that we've noticed and that will mature in December, if they're concerned about it, if they contend that that's hurting their ratings, that that's hurting their ability to conduct business, they can issue the guarantee today, and then they would be in compliance with the terms of Section 11.03.

There may be other reasons they don't want to do that, to be sure. And if they get back, they may have issues with the people that they just sold those notes to, the lower tier notes guarantors, from their exposure to them, but that's not our issue, your Honor. To be in compliance with our indenture, all they need to do is issue those guarantees, because if there is any dispute, those entities today have all of the assets that we had before this transaction happened, and that's the crux, your Honor, of our argument with respect to the contract.

THE COURT: So where do I look in the agreement itself or in case law that defines this kind of transaction as a disposal of all of the assets?

MR. LEBLANC: Your Honor, I think we address that on the next slide. The next slide just walks through each of the elements. But, your Honor, I don't think you will find it in case law. And the reason for that is -- I do think that there are a couple of cases that I will point your Honor to in a couple of seconds. The fact is that this provision -- and I

think to answer the question I need to tell you why the cases that they cite aren't relevant, and let me try to do that.

We think it's as simple as the following proposition, your Honor. "All" means "all." And all of what, is the question. The answer to that is it's all of the assets held by the conveying subsidiaries.

And, your Honor, let me just jump you ahead to page 18. And I'll show you why I'm going there, your Honor. Page 18, this is a little bit of an eye chart. On the right side, your Honor, there are two provisions. At the top is Section 5.01.

THE COURT: Yes.

MR. LEBLANC: That is the boilerplate language that exists in every one of the company's indentures and all of the ones that are at issue in each of those cases. Section 11.03 at the bottom, that is our individual guarantee provision relating to the particular series of notes. And the fundamental difference actually, your Honor, among the fundamental differences in this, is that at the very bottom of the Section 5.01, it says with respect to that provision -- and I don't know if your Honor can read it. It's also on page 23, where we have the same provision. I'm not sure if that is easier to read for your Honor.

THE COURT: Yes.

MR. LEBLANC: OK. It's a similar concept. These are

two examples. This is Section 5.01 on the right side from our indenture and Section 5.01 on the left side from the 2026 indenture, which, again, that is the PGN indenture that does not have 11.03 but it does have Section 5.01. At the bottom, it says, "for the avoidance of doubt, unless otherwise provided in a supplemental indenture or board resolution, the term 'merger' includes an amalgamation under Cayman Islands law, and the term 'all or substantially all of its assets,' with respect to the company, shall be computed on a consolidated basis."

That is what Section 5.01 says, your Honor. That provision is not in Section 11.03, and very specifically not, because Section 11.03 is not a consolidated analysis. It is not a whole-company analysis. Section 11.03, by its words, looks only at the assets held by the subsidiary guarantor. And when you recognize that, that that's a fundamental distinction, you can then conclude, whether it's *Sharon Steel*, *Dynegy*, *Gimbel*, any other one of those cases, that that's what's at issue here. That's why they exclude, for example, internal restructuring, because when you consider it on a consolidated basis, the fact that one entity may have transferred assets but they stayed within the family, in the words of Mr. Kurtz, there's a continuity of assets, that can be relevant if you're considering it on a consolidated basis. But in our view, 11.03, by its very words, is absolutely clear that this only applies to this one set of entities, this one or more entities

that convey the subsidiary guarantor.

Your Honor, that's why I would say your Honor should begin the analysis of contractual interpretation by looking at the words of the contract. That's why we started our argument showing you the words of the contract that we allege to be breached. And no amount of case law, your Honor, is going to modify the words of this contract, because they simply don't address these issues.

I also would note, your Honor, Mr. Kurtz had an argument and said -- I was going to get to this later. Let me just jump to it now, just to be responsive to your Honor's question. Then I'll go back. There's an argument that, in citing to the *Hollinger* decision, that suggests that "all" means "substantially all." And that is literally the words that the court used, but it's important to put that statement and that quote into context. And I've got the same quote because we thought it was relevant too. What the court is saying is that, even in the prior iteration of the Delaware statute that governs when a shareholder has a vote on a sale of all the assets, the statutory regime did not include the words "or substantially all." It only said "all." And courts were interpreting "all" to be inclusive of "substantially all," for the reasons that are said at the bottom of the statute. It says, the quote that we have, the word "all" meant "substantially all" because the statute could not be resisted

by retaining a small amount of property not vital to the operation of the business." The Delaware legislature codified the concept of "all or substantially all" in 1973. But it's not to suggest that "all" would ever not be satisfied when all the assets are transferred. That's just wrong.

And in fact on the very next page of the decision, what the Delaware chancery court does -- and I'm going to read the book because we didn't -- we saw this in their argument and were sort of blown away. They actually say, on slide 29 of their deck, that "all means substantially all," they suggest that that somehow helps them. And what the court actually said, and I quote, "'all' means 'all.'" Or, if that's not clear, "'All,' when used before a plural noun such as 'assets,' means the entire or unabated amount or quantity of the whole extent, substance, or compass of the whole," period.

Then the court goes on to decide, what does "substantially" mean, because the issue in that case, as it is frankly in every case that they cited, is a circumstance where less than all of the assets have been transferred. And the question the court has to decide is, Does that transfer constitute "all" or "substantially all"? Is that "less than all" transfer enough? Even in *Sharon Steel*. What was at issue in *Sharon Steel*, it's a completely inapposite situation, but in *Sharon Steel* what was at issue was, the company, over the course of a nine-month period, had sold all of its assets, and

had given dividends to shareholders, and then had a very small amount of assets left at the end that it showed to *Sharon Steel*, with a pile of cash. And *Sharon Steel* wanted to keep the indenture in place. It wanted to have the indenture stay outstanding because that indenture had favorable terms. And so it wanted to take the cash, pay the interest, and then ultimately pay the principal. The borrower lost in that case. Sharon Steel lost. And what the court said is: No, you don't have the right to assume that indenture, because, over time, this, the last sale, wasn't the sale of substantially all or all or substantially all of the assets. You have to look at this over the nine-month period. And over that nine-month period, you sold all of the assets previously, so you actually have to redeem the notes, you can't keep them outstanding. So it really doesn't bear on the question that we're addressing here. But more fundamentally, your Honor, these courts are grappling with the question of, how do we define if "all" was enough. That is not the question they decided.

THE COURT: That's not the question for me either. The question is not whether or not "all" is enough. The question is not a quantitative question before me. It's a qualifying question. The question is whether or not this type of transaction falls under that definition or whether or not you need a transaction that demonstrates that the subsidiary guarantor no longer has ownership or control over the assets.

Isn't that the first, fundamental question?

MR. LEBLANC: Your Honor, it is. I agree with you that the issue that your Honor has to decide is, when the subsidiary transferred every share that it owned of its assets, did that constitute all of its assets.

THE COURT: Well, the question is a little different than that. The question is whether, when they transfer all of those to the subsidiary and they still own all of the assets of the subsidiary, is that a transfer of all or substantially all of their assets.

MR. LEBLANC: Yes. Your Honor, I think that is a fair question. I think that's the way to articulate it. And I think I've talked about this, and I'll talk about it more. We don't think there's any ambiguity in this contract, because what's offered -- and I think if I take you back, your Honor, to slide 6, just because I think what's critical here is to look at the contract language at all times, what's covered by a transaction is anything that includes the sale, lease, conveyance, transfer, or disposal of all or substantially all of the assets of such subsidiary. There is no dispute that sale can have, coming back to it, it can be an exchange of value. We don't dispute that. They don't dispute that. It doesn't mean it no longer is a transfer. So even if this had been sold for cash to an affiliated entity, that still would constitute a transfer. The fact that, in return for

transferring away all of the assets that the entity has, it got nothing back in return, cannot excuse the application of this provision. That's what they need you to believe, that the fact that it was an exchange for -- that we no longer have the very thing that the entity we guaranteed from has.

And, your Honor, I do think it's critical to recognize that this is sui generis to this type of guarantee note. Mr. Kurtz alluded to it earlier, that in 2015 this is the structure that they used to create the priority guarantee note, because the unsecured notes that were issued above, at a level above and therefore prior to this exchange, were structurally junior to us, did not have this protection. They have a Section 5.01, but because they engaged in an internal restructuring, those noteholders didn't have the ability to stop the company or to require the company to grant them a guarantee when they created the upper tier holdings guarantors, our subsidiary guarantors. The holders of these notes specifically negotiated for this exact protection, this exact protection.

THE COURT: Well, when you say "this exact protection," I'm not sure what it is you're referring to. And I'm not sure what it is you're asking me to rely upon for this summary judgment motion, because I don't have that evidence.

MR. LEBLANC: Well, let me tell your Honor, what you do have is the following: You have this indenture, with the

words that are here. You have the other indenture, that lacks these very words, your Honor. And you also have the rest of this indenture. And what I mean by that is, you can see, your Honor, that Section 5.01 does not have this protection, because it treats it on a consolidated basis, which, that implicates the other cases that are cited by Transocean. This language was written -- what I'm telling your Honor is, you can take note of the fact that this is not boilerplate because it doesn't even appear in each of the Transocean indentures. Therefore it can't be considered boilerplate. And it's different. And what I would urge the Court to take account of is the fact that, unlike the other provisions, it is limited to this particular entity, this guarantor entity, because this falls in the section that governs only the guarantors. Unlike the other section, it has the clause that it specifically excludes external transactions, so transactions with entities other than affiliates. That's not in the successor guarantor provision of Section 5.01. So those differences your Honor can look at and take note of. And I do want to walk through their arguments because I think that "transaction" comes up in a bunch of different arguments as to what it should mean for each of them, and I can do that quite quickly. But the point is that when you go through the language of this, when you parse this language, when you actually look at the language, I think your Honor will conclude that this is exactly what someone in

the shoes of the PGNs would have sought to protect themselves from. And Mr. Kurtz says it. It's what they did already through a notice of default, and it's what creates an advantage for this particular holder or set of holders to have a guarantee that is greater than just the same claim that the unsecured creditors have. To be clear, we are not saying that we are entitled at all times to be senior. We concede, they could raise senior debt in a number of different ways. They just have to do it in a way that is consistent with Section 11.03, with our indenture.

THE COURT: But I'm not sure I understand, if you said that they're entitled to have other debt senior to your debt, I'm not sure why this kind of transaction is so unique that I'm supposed to assume that somehow it adds some special protection that you didn't otherwise have.

MR. LEBLANC: Your Honor, I think there is a straightforward answer to that. This company is a party to something like 20 different credit facilities. And those credit facilities allow it to do certain things. Each of those credit facilities have their own restrictions imposed upon them.

THE COURT REPORTER: I'm sorry. When you say "this company," what are you're referring to?

MR. LEBLANC: Transocean, your Honor. They've got innumerable credit facilities. That's why it's so hard to

parse through what was happening and to compare it to the rights that each of the indenture holders had to get to the point.

But what's relevant about that, your Honor, is, there are protections in those other indentures, in those other credit facilities. So, for example, there's nothing in our indenture that stops them from raising additional revolver indebtedness. We argue that affirmatively, that they can do that. And that revolver indebtedness is structurally senior to us. The problem for them is, they have to get somebody to lend them that money. And if their intent was to lend them that money and to use it to repay unsecured indebtedness of the parent, we don't think they would be able to borrow that money. That's the economic reality of it. So we don't have to protect ourselves against everything that they could do.

And I think that *Sharon Steel*, Second Circuit Judge Winter's decision in *Sharon Steel*, it's crystal clear on this. Because in *Sharon Steel* the court noted that the company could have merged in that instance and that wouldn't have been a violation of its terms of the indenture, but what Judge Winter goes on to say is, the lenders here are relying on the economic rationality of the shareholders. And I would add to that the economic rationality of everybody else, because what we got protection from, in Section 11.03, is their creating a new set of obligors between us and the assets and then levering those

entities up with new debt. That is exactly the protection we get by the very plain terms of these words. What we didn't need is protection from the revolvers lending additional money because we know that revolver lenders are always going to be constrained by what they choose to lend based on the value of the assets. And so we're relying on economic rationality.

But all that really matters for today & purposes, your Honor, is the very thing that this provision prevents -- or, it doesn't really prevent because it allows this but then requires them to grant us the guarantee -- is exactly what they did. And so the fact that they could have done other things but chose not to is of no moment. It's the fact that they didn't do what they were required to under their indenture. And there's nothing, nothing that prevents them from doing now that we're aware of, nothing in our indenture, we don't believe, would say to them, we can't issue you a guarantee today. They could do that. But they've chosen not to and instead chosen to be at breach. And so if your Honor concludes, as we think you must, you think they breached the terms of the indenture by transferring all of the assets of the subsidiaries, of our guarantors, then they could just issue us the guarantee. That is their choice. But there's no limitation on that protection for us, your Honor.

Now, your Honor, let me just go sort of quickly because I think it's useful, in answering your Honor's

question, I think it's useful to actually hit most of the arguments that they raise, and I've talked about most of these, but on slide 7, your Honor, there's an argument that originally ran through their response that says, and I think even today Mr. Kurtz alluded to it, the notion that this type of provision doesn't apply to internal transactions. I thought they had gotten around that because in their response they conceded that 11.03 does apply to affiliate transactions. I think, as we walked through it a few minutes ago, it *only* applies to them. And so to suggest that this provision doesn't apply to internal restructuring, because the *Dynegy* provision that was at issue there didn't apply to internal restructuring, is just wrong. It's arguing a different contract provision that we do not contend this implicates.

I didn't hear the argument today, now looking at our slide 8. There was an argument made in our papers that Article 11.03 only applied to an upward or lateral transfer. There's no surprise that they wouldn't show the indenture language on this because there's literally no set of words that you could read in the terms of 11.03, or the indenture in full, that would suggest it's limited to upward or lateral transfers. The words just don't exist. As your Honor noted, and this is in our slide 9, "person" is broadly defined, and Mr. Kurtz agrees, your Honor, that "person" would include the lower tier notes guarantors that they created and then transferred all of the

assets to.

So, your Honor, the only way that their reading of limiting it to upward or lateral transfers could have meaning is if you literally read it into the provision, and it's another exception. Because, remember, as I said, there are exceptions in our Section 11.03 for where the other person who received all of the assets is not the parent, the issuer, or another subsidiary guarantor. Those exceptions exist because those entities are already obligated on our debt to us. But they would have you read "or" -- they would have you read into it another exclusion that we put here in red, "or a subsidiary of a subsidiary guarantor." And that's just not in the provision that's at issue.

I'll address quickly because I know your Honor addressed it quickly, Mr. Kurtz did, you saw what I would describe as -- you saw the effort that they made to try to make an argument under Section 11.03 by the way that they engaged in the transfer. In fact this is the only time you actually saw, from Mr. Kurtz, the contract language, which is on slides 32 and 33 of their deck. Slide 33 shows this exceedingly complicated scheme where they say no entity transferred the assets. But, your Honor, what they don't even cite anywhere there is a rule of construction in the indenture itself that says the singular means a plural. And so if you go back to the language of the indenture, the fact that they engaged in the

game that they did to not transfer all of the assets to a person, as opposed to three persons or to a person, is totally irrelevant. And I think your Honor hit the nail on the head when you said, the focus, as we read the provision, the focus is on, did the subsidiary guarantor transfer all of its assets. If the answer to that is yes, then the person or persons, because of the rule of interpretation, must grant the guarantee. the fact that they did it to three different, you know, split it up in three ways, all that suggests to us, your Honor, is that they probably knew that they had a problem and were trying to avoid it, just to create an argument where no one entity got more than half of the assets. Otherwise they could have just done it on a straight line. But even the way they did it, just based on the basic structural interpretation of the rule, the rules of interpretation, does not work, your Honor. So that result doesn't apply.

Another argument that they make, and they cite to the cases that talk about value that was transferred, and this is Mr. Kurtz's suggestion that this should be quantitative, and his argument that we've only lost 5 percent of the value. One issue, your Honor, obviously your Honor knows -- book value and share market value are two very different things. I will just say to the Court, in evidence before your Honor already is the fact that our notes are trading at 27 cents on the dollar. If the company had $22 billion worth of assets, if that was the

value of their assets, our notes would not be trading at 27 cents on the dollar.

And your Honor, to be clear, there are provisions of the indenture -- and we show this on page 14, that reference value when the parties intended to reference value. Here we don't do that. Here in the contract provision that is relevant to this issue, your Honor, it refers to the transfer of these assets. The assets, as we talked about, are just the share certificates. That's why, your Honor, this quantitive and qualitative test that we talked about at length, it doesn't make any sense in the context of this case, where literally all of the assets were transferred.

I don't want to belabor that because we've done a number of slides that talk about this. Let me cover *Dynegy*, and then I think it's important for me to talk for a minute about their arguments with respect to 4.04.

With respect to *Dynegy*, your Honor, the holding in *Dynegy* was that the provision that was at issue actually only controls the holding company, DHI. And DHI didn't actually transfer any assets. It was transferred at a level below the DHI level. There was one asset that was transferred at the DHI level, but that was immaterial relative to all of the other assets that were transferred. And so the court there actually held that the provision was not implicated for that reason.

And when you look at their slide, it couldn't be more

clear that the next holding is dicta. But, again, it doesn't matter, for the reasons I talked about, because, your Honor, having held already that it didn't apply because DHI was not governed by it, they're looking at it on a consolidated basis, looking at it on the overall effect on the company. And I think even their slides with respect to *Dynegy* have made this point. Yes. Where they talk about, they said, on their slide 24, "the transfer at issue was between subsidiaries having the same parent, i.e., an internal corporate reorganization." For the reasons we talked about, that's not our case. And "DHI retains the value of the plants embedded in its ownership of the entities that directly own those plants." And that's because they're considering the transfer at issue on a consolidated basis and not being transferred away from DHI's ultimate ownership, again, on a consolidated basis. If we were here, your Honor, arguing that Section 5.01, that successor obligor provision, had been breached, then their argument would have some merit. But we are not. We are here arguing that Section 11.03 has been breached. And that's a fundamentally different provision, for all the reasons we talked about.

So let me talk for a second, your Honor, about Section 4.04. So Section 4.04 is defined, Section 4.04 itself is defined as a limitation on subsidiary indebtedness. It's not a permission of any sort. Instead, it imposes a fixed limit on the amount of indebtedness of the subsidiaries of the issuer.

And that's what it does. 4.04(a)(12) doesn't say one word about whether that indebtedness can be junior, senior, pari passu. It's silent as to the ranking of that. And the reason for that, your Honor, is, it talks about it on a consolidated basis. And I think if you compare -- and I'm now on our slide 20 -- if you compare Section 11 to Section 12, you can see the difference. Section 11 is a limit on the amount of indebtedness that can be incurred by any of the guarantors themselves. Section 12 is a limit on the amount of indebtedness can be incurred by all subsidiaries together. They're talking about two fundamentally different things.

But critically, your Honor, the entire discussion is a red herring in the sense that we are not saying that Section 4.04(a)(12) was breached. What we are saying is that Transocean can raise senior debt but they have to raise it in a way that's consistent with all provisions of the indenture. And they could even do that here, today, by simply complying with 11.03 and granting us the guarantee. There is no prohibition on doing that. Our argument is not that they breached it by raising debt that was senior to us. Our argument is that they failed to grant us the guarantee that's required, not in connection with the debt raising but in the transfer of the assets of our subsidiaries. They have no response to that, your Honor, whatsoever. There is no inconsistency between 4.04(a)(12) and 11.03. They can do

everything they wanted to do. They just have to grant us the guarantee.

And, again, the fact that their main argument is that there's an argument under Section 4.04 just shows how misguided their approach to this is. That's not the section that says that our notice of default says they breached. We're not arguing that. We agreed they could raise the debt. They're just saying, we can raise the debt and we don't have to comply with the other terms of the indenture. And that, your Honor, is simply wrong.

And as we've noted, the company has in the past raised additional senior debt through their revolving credit facility, and they've had no notice of default from us with respect to that. That's not what they did here, and for their own reasons, for whatever reason. And it may well be that they couldn't accomplish it as a business matter. It may well be that their shareholders wanted -- it wasn't enough advantage taking of the pandemic for them, that they wanted to get more and they did it this way. But whatever reason they chose to do it doesn't matter, because they were obligated, when they transferred the assets, created those new entities and transferred our assets to them, they were obligated to grant the guarantee.

THE COURT: How is their ownership different, ownership of the assets different, if they owned the asset

holding companies that own the asset as opposed to they own the secondary subsidiaries that own the asset?

MR. LEBLANC: When you say "their," your Honor, you're referring to my client?

THE COURT: No, I'm referring to the subsidiary. You say that they no longer own the asset because they transferred those assets to the second tier subsidiary. Under your chart, the original setup was they still didn't own the original asset; they owned the asset holding company that owned the asset. So how is their ownership different now, except that there's another layer of companies?

MR. LEBLANC: Your Honor, I think that exception, that he just said, except that there's another layer, that's exactly the point. We contracted to not have another layer between us and the asset holding company.

THE COURT: What language are you saying stands for that proposition?

MR. LEBLANC: Because the assets of the subsidiary guarantors at the time it was issued was the equity in the asset holding companies.

THE COURT: Right.

MR. LEBLANC: If those assets were transferred internally to another entity, then that entity was obligated to grant us the guarantee. That's what I'm saying. It's the very language. And, your Honor, that actually, that exception

exactly hits the point. What that contract provision says, the way I think your Honor should read it and the way that we read it is that we contracted to have no one between us and the assets that we have, which is the interest in the asset holding companies.

THE COURT: But that's not the assets. The asset is the assets that the asset holding company holds.

MR. LEBLANC: Those are assets, your Honor, but those aren't our assets. The assets that the subsidiary guarantors have, at the time that this contract is executed, the only asset they have is the equity in the asset holding company. And that's what 11.03 protects us from. And I put up slide 5, your Honor, which compares the before and after --

THE COURT: Right. I have it.

MR. LEBLANC: -- from the interposition of some entity. If I had the technical ability to do it, your Honor, I would take Mr. Kurtz's chart, at slide 30 -- and I'll hold it up to the camera. This is the one you can see, your Honor, that has, you know, if holdco A holds holdco B and then you interpose holdco B and then you interpose holdco C, looking at that, under our contract, every one of those holdcos would have to become a guarantor. And that is what those words actually say, on any plain reading of them. And that protection was important. And your Honor doesn't have to take parole evidence of it. The fact that that protection was built into this

particular contract, and this is another contract, your Honor can conclude that that was necessary or desirable by the people who agreed to lend money under this, the fact that it is a bespoke provision for this indenture. And it's protecting us from exactly this transaction that occurred.

And it is true, your Honor, that the asset holding companies themselves could have done things below them, but we have some measure of protection. And this is the *Sharon Steel* language that Judge Winter, what he says, *Sharon Steel*, 691 F.2d at 1050, said, "Lenders can rely, for example, on the self-interestedness of equity holders for protection against mergers which result in a firm with a substantially greater danger of insolvency." We had the ability, and the lenders here, who lent -- and remember, your Honor, this loan was just put in place in January of 2020, so nine months ago, a loan that's trading in 2027. The lenders negotiated for a particular protection. And it's not economically irrational that we would permitted, with all of the other credit facilities that they have, including a revolver, that everyone knows, revolver lenders, they're not high-yield lenders. They put very real restrictions on what a company can and cannot do how it can and cannot use its money. So by ensuring that they could not interpose an entity between us and the asset holding companies, that is an economically rational decision that we rely on the self-interestedness of the other lenders to this

entire company to ensure that no sort of shenanigans or no gamesmanship is going to happen at the asset holding company level or below.

But to be clear, these are high-yield notes, so they're not a kind of protection. But we are protected from that. And we rely on protections that other people have ensured that they will have, that the company, borrower is not going to do something economically irrational to harm their investments there.

And it is exactly, your Honor, I would submit, this is exactly what the words of this contract were designed to prevent, exactly this situation. And that's what Transocean, the borrower, is saying: you should just ignore those words, ignore them. If you accept their interpretation, your Honor, I don't know how you're giving any meaning whatsoever to Section 11.03 that is not sacrificing this protection to ensure that they get other benefits that they negotiated because, as I said, there is no inconsistency. And we're not saying that they can't raise their money. We're not saying that they can't create the lower tier notes guarantors. We're not saying that they can't transfer the assets of upper tier notes guarantors to those entities. All we're saying is that when they do that, or I should say if they do that, if that's the transaction that they choose to engage in, then our contract requires them to grant a guarantee by the lower tier note guarantors. That's

all we're saying.

And, your Honor, I have a couple of other pages in the deck but I don't think it's worth going through it. I think that's probably a better place for me to close. Your Honor, the way we look at this, we focus, and as your Honor can tell, we focus very much on the language of this contract -- not on other contracts, not on other provisions that are not implicated here -- the language of this correct, and when you read the language of this contract, I don't think there can be any question but that it was breached by their failure to provide the guarantees that are required under it. And they can't point to a single reason why they can't do that today.

Your Honor, what we are asking is for a determination, summary judgment in our favor that the alleged default that we have alleged in the notice of event of default that was issued in early September, a default that they failed to comply with Section 11.03, a determination that that is not invalid and therefore granting summary judgment in our favor. The effect of that, your Honor, whether they choose to cure by granting us the notes, by granting us the guarantee, or whether they choose not to do that and then we exercise our remedies after it ripens into an event of default, that is an issue for another day. The only issue before you, your Honor, at this moment is whether or not they're in breach of 11.03, and we would submit, your Honor, there's no question that they are.

Unless your Honor has any questions, I'd be happy to --

THE COURT: No. Thank you. That's helpful, Mr. Leblanc.

Mr. Kurtz, did you have anything further that you wanted to add?

MR. KURTZ: I do, your Honor, and I will try to be brief, here, but there is really a fundamental defect in all of that that I do want to make sure I've addressed. And basically, just to reset the table, there is an established test for determining whether there has been a breach of the successor obligor clause. You can't get rid of 40 years of jurisprudence, including controlling authority in the Second Circuit, by trying to distinguish everything factually. These aren't cases that were always addressing facts. They were establishing standards of law. Mr. Leblanc says, well, wait a minute, you know, it's not boilerplate, it's bespoke. That's not so. We started off by saying, 5.01 is boilerplate and 11.03 is not. Well, 5.01 is a boilerplate successor obligor provision that is directed to the parent company, and 11.03 is a boilerplate successor obligor position addressed to the subsidiary. The reason they're different is because they apply to different parties. Mr. Leblanc has not and cannot identify anything unique about 11.03 that is relevant in any way to four decades of case law, because the four decades of case law

didn't look at particular provisions, which invariably have some changes in names and in cross-references. What the cases interpret is the phrase "all or substantially all." And Mr. Leblanc very carefully avoided that exact issue. He can't reinvent what it means to be all or substantially all. And as your Honor pointed out, the operating assets, the only assets with value, are still held exactly to the same extent, 100 percent still held.

The second way that counsel try to distinguish 40 years of authority is by saying -- and also tried to distinguish the senior debt basket and the law that says you have to reconcile them -- is to say, sure, you can reconcile them, you just have to provide a guarantee. He said that time and time again, as if that were a unique issue. Every single successor obligor clause in the history of successor obligor clauses provides that you can't transfer all or substantially all, as determined by a test, unless you give them a guarantee. You never have to deal with the "all or substantially all" test if you just issue a guarantee. Every single case started from the proposition that there was no guarantee, and moved to determine whether the transaction did constitute a transfer of all or substantially all because it destroyed the economic vitality and changed the corporate purpose and resulted in a liquidation and eliminated the ability to repay the loan. So this idea that, oh, let me distinguish the cases because all

they really had to do was sign a guarantee, that's exactly what was at issue in every case. You don't have to sign a guarantee unless there's been all or substantially all. If everybody had signed guarantees we wouldn't have case law on it, because that's what your choice is.

Mr. Leblanc said several times they bargained for this protection. They bargained for a boilerplate successor obligor provision, and that means exactly what every case has said it meant. If they wanted a protection, then what they needed to do was to have a provision that said something very different, not a successor obligor provision, or have one that said, provided, however, that the case law does not apply because, here, there will be no ability to transfer assets in an internal reorganization, even if it turns out to be the case that your ultimate ownership of the assets remains unchanged. Because that's what the cases provide. And that's what's allowed. So there was no specific negotiation for some bespoke provision that protected this. To the contrary, the section of the indenture that addresses claim priority -- and that's all their complaining about. They're claiming that they have been primed. That's Section 4.04. And that has not been breached.

And when Mr. Leblanc says, you can still implement Section 4.04(a)(12), on senior debt, because you can't offer a guarantee, that immediately eliminates subsection 12, because if you give a guarantee, then you're pari passu, which is

covered by Section 11. So Mr. Leblanc does not account for Section 12. He reads it right out of the contract.

Last couple of comments, your Honor. The *Hollinger* case came up. Mr. Leblanc said he was sort of blown away that we cited it, because "all or substantially all" means the same thing. Whatever the response was to that, I want to highlight that *Hollinger* applied the same test that we ask get applied here, which is qualitative and quantitative factors, exactly as we've argued that they be applied.

On harm, I think there was some effort to sort of convince your Honor that somehow they've been harmed because of the enforcement of a specific right to raise senior debt. They gave your Honor, on slide 2 of their deck, these note prices that kept declining, started at 49, ended up at 31. What Mr. Leblanc didn't tell you is, all of that predates the exchange. So the implication that the exchange has hurt their paper is wrong because all this is pre exchange.

And then when he chose a random date of October 7 to say that the notes had dropped to 27, that's a random date. The exchange closed on September 12. According to the output that I'm looking at, the trading price on that date was 33, which is actually higher than what he was showing. And as of today, the price is 28.25, which is higher than what he showed too.

In any case, the way the paper trades is no causal

relationship between the exchange offer or the reorganization and how the paper trades. The paper trades based on everyday business operations. And there's not been an effort made or can be an effort made here to suggest that because the trading price moved around, that that has something to do with the exchange offer. If it had to do with the exchange offer, it would have happened at a point in time and it wouldn't keep bouncing around.

The last point that I feel like I have to comment on is this twice talking about somehow trying to take advantage of the pandemic. Here's what the facts are. The facts are there is a pandemic. The facts are the pandemic has made it difficult to operate businesses. It has an adverse impact on people's ability to hire for drilling and to undertake these kinds of projects. What that means to a company, which has fiduciary duties to its stockholders, is that it has to take action, is required to take action, to best position itself to withstand what's going on in the world right now. And the way companies do that is, they try to strengthen their balance sheet by getting consensual agreements, which they've gotten here with everybody but the dissident noteholders here, consensual agreements, extend the maturities, you get a little extra on interest, you exchange it to something that has other attributes. They choose not to do that. They continue to have the same rights they've always had.

And I'll note that at least once Mr. Leblanc actually used the word "the debtors." Because what they're trying to do here is force this company into bankruptcy. In fact, Mr. Leblanc is a bankruptcy lawyer. And the company doesn't need to be in bankruptcy right now. The company has strengthened its balance sheet and is in a position to withstand what's going on here. We don't need to wipe out shareholders, retirees, pensioners and people like that so that the distressed investors that buy it cents on the dollar can have an outsize recovery.

Thank you, your Honor.

THE COURT: You're welcome.

Mr. Leblanc, did you have anything further before we adjourn?

MR. LEBLANC: Your Honor, I do, in two minutes. And let me go in inverse order. I am a bankruptcy lawyer. I'm also a litigator, your Honor. So it's a little odd to suggest that I favor bankruptcy as a litigator. I don't take it as an insult. But I've seen Mr. Kurtz for many, many years in bankruptcy court right along with me.

But, your Honor, if you look at the notice that he's referring to, the letter that I wrote to him in early August doesn't refer to bankruptcy. We wanted the company, wanted at the time the company engaged in a holistic restructuring discussion, not -- at that time they were just trying to

advantage one member of their board. We thought that was a bad idea. We continue to think that this piecemeal effort, that picking off some debtholders is a big mistake, and we should be engaged with the company in a holistic restructuring. That's what our clients are looking for and that's what we'd like, not a bankruptcy here.

Your Honor, there's a reference to the prices of the debtor securities. I used what I used to present the evidence in the record, your Honor, not what Mr. Kurtz just read off of a screen. If there was an issue with that they certainly could have responded when those documents were put in the docket.

And the relevant date is not the date that the transaction closes. The point is, trading 39 cents on the dollar before the exchange, the series of exchange transactions, including the first one when a director of the company was announced, that's what's relevant. That's why we're using 49 cents as the amount that we've lost.

Mr. Kurtz still has no response to the fact that they can raise senior debt, they just can't do it in the way that they did it here. That is a fact. He can't respond to that. He suggested that 11.03 is boilerplate. But, your Honor, we walked through, in two critical ways, why the words of 11.03 is fundamentally different than the boilerplate provisions of Section 5.01. And that make it fundamentally different in interpretation. One, it does not treat the assets of the

debtor on a consolidated basis. It doesn't speak to their values. And most significantly, it expressly excludes, and they conceded this point in their pleadings, it expressly excludes internal reorganization. It expressly excludes that. The boilerplate provisions don't do that.

And then lastly, your Honor, just the more fundamental point is, the notes that our clients bought in January of this year were issued as priority guaranteed notes that have this level of structural seniority, that have this additional protection. In return for that, the debtors get to pay less in interest. If Mr. Kurtz is right that the PGN, as issued, that you can just ignore that structural seniority and the protections that we have to protect that structural seniority by preserving our assets or giving us a guarantee if they're transferred, if you could just ignore that, your Honor, then these notes should have no advantage over any other note. And that just ignores the entirety of Section 11 of the contract. That would be an incorrect interpretation, your Honor. And contrary to 40 years of precedent interpreting prior guarantee note provisions and the successor guarantor provision for those particular contracts, that's what's at issue. You have a straightforward basic contract interpretation question in front of you, and you don't have to look at anything other than the words on the page. That's why we showed them to you previously. This contract has been breached, your Honor, and

we believe summary judgment is appropriate in our favor.

Thank you.

THE COURT: Thank you, gentlemen.

I know you have a critical date coming up in the next few weeks, so we'll get you a decision before that date.

All right.

MR. KURTZ: Thank you very much, your Honor.

THE COURT: Thank you, Jim.

MR. LEBLANC: Thanks much.

(Adjourned)